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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1063

HERMAN P. UNGER, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PATRICK A. TUITE,
134 N. LaSalle Street,
Suite 2200,
Chicago, Illinois 60602,

Attorney for Petitioner,

KEENAN PRINTING COMPANY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. ——

HERMAN P. UNGER, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the U.S. Circuit Court of Appeals for the Seventh District on this cause on November 28, 1972.

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit has not been reported as yet but is reprinted herein as Appendix A, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on November 28, 1972. A timely petition for rehearing was denied on January 2, 1973 (Appendix B). This petition is filed within 30 days of the final order of the Circuit Court of Appeals. The jurisdiction of this court is invoked under 28 U.S.C. 1257.

QUESTION PRESENTED

Does a hearsay affidavit for a search warrant state probable cause when it does not set forth the reliability of the hearsay information nor is the hearsay information corroborated in any manner and where there is no allegation as to when the informant received the information related to the affiant?

CONSTITUTIONAL PROVISION INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amendment IV, U.S. Constitution.

STATEMENT

Your petitioner, Herman Unger was charged with a violation of Section 26 U.S.C. 5861(d) for failing to register certain firearms. He was found guilty and fined $500. The weapons which were alleged not to have been registered were found as a result of an execution of a search warrant issued by a Judge of the Circuit Court of Cook County, Chicago, Illinois for the search of his premises. A verbatim copy of the search warrant and complaint for said search warrant is attached hereto. (Appendix C.) A timely motion to quash the warrant and to suppress the evidence was denied. The complaint for the warrant was based on the affidavit of the police officer who stated that he talked to a citizen who had given him certain information about the weapons in question. There was no identity of the citizen; there was no allegation of reliability of this citizen; nor was there any allegations of evidence corroborating the hearsay information. Further, there was not time set out in the warrant as to when the informant allegedly saw the property in the basement of the defendant's home.

REASONS FOR GRANTING THE WRIT

A.

A HEARSAY SEARCH WARRANT WITH NO ALLEGATIONS OF RELIABILITY OR EVIDENCE OF CORROBORATION AND WITHOUT INDICATION OF THE TIMELINESS OF THE INFORMATION DOES NOT ESTABLISH PROBABLE CAUSE TO SUPPORT A VALID SEARCH WARRANT.

B.

THERE IS A DEFINITE SPLIT AMONGST THE CIRCUIT COURTS OF APPEALS ON THE QUESTION OF WHAT INFORMATION IS SUFFICIENT TO ALLEGE TIMELINESS OF THE INFORMATION CONTAINED IN THE COMPLAINT FOR WARRANT.

The complaint for the search warrant, which is set out in the appendix hereto, (Appendix C) alleges that the affiant, Investigator Monroe Vollick, is a Chicago Police officer; that he was contacted by a citizen who had occasion to be in the basement located at 5424-26 N. Ashland while working at his occupation and saw in an enclosed locker at that location a cache of weapons and ammunition. The complaint further states that the citizen said that he was familiar with weapons, having served in the United States Army and worked in ordinance, (sic) and that he knew what the weapons were. The search warrant called for the seizure of:

> "A cache of weapons including machine guns, machine guns with tripods, rifles, rocket launchers, cases of ammunition for the above weapons, all in violation of the Illinois Revised Statutes."

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These weapons were sought by way of the search warrant because of the alleged violation of the Illinois unlawful use of weapons statutes and failure to register weapons statutes.

Not one word is mentioned in the complaint for the warrant as to what weapons the citizen allegedly saw or that there were in fact machine guns, rocket launchers, or any other specified weapons in that locker. Further, there was no allegation that any of these weapons were not registered pursuant to law or that any of the weapons were in operable condition.

More importantly, however, the complaint is based on pure and simple hearsay which does not state anything to establish the reliability of that hearsay and is therefore insufficient to establish probable cause for the search of the defendant's premises. This court in a landmark decision of *Aguilar* v. *Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) held:

> "Although an affidavit may be based on hearsay information and need not reflect the direct observations of the affiant (citations) the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed (citations) was 'credible' or his information 'reliable'. Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate' as the constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime' . . . or, as in this case, by an unidentified informant." 12 L. Ed. 2nd at 729.

In that case the Court held that the search warrant should not have been issued and that the trial court erred in not

quashing it. In the *Aguilar* case the affiants, who were two police officers, had "reliable information from a credible person" to believe that certain items were in the defendant's premises.

In the instant case the affiant-officer said he talked to a "citizen". He does not in any way establish whether this was an anonymous phone call; whether this was a personal meeting or what. Nowhere is the issuing magistrate informed that this "citizen" had been reliable in the past or was corroborated in any way by the police officer. We have here a bare hearsay affidavit with no independent reliability established. If a complaint for a warrant such as this can stand then the police officer becomes the judge of probable cause which is what the Court in *Aguilar, supra,* condemned.

On the week following the decision in *Aguilar* v. *Texas, supra* this Court in a *per curiam* opinion vacated a judgment citing *Aguilar* v. *Texas. Etchieson* v. *Texas,* 378 U.S. 589, 84 S. Ct. 1932, 12 L. Ed. 2d 1041 (the case below is cited in 372 S.W. 2nd 690.) In that case the warrant stated that the police officer had been informed of the existence of certain facts by a "reliable, credible and trustworthy citizen of Dallas, Texas". The Court in reversing the judgment found that was insufficient to state probable cause and only cited *Aguilar* to support its decision. In another *per curiam* decision in *Riggan* v. *Virginia,* 384 U.S. 152, 86 S. Ct. 1378, 16 L. Ed. 2nd 431 (1966) the Court reversed the conviction citing only *Aguilar* v. *Texas, supra.* The complaint for the warrant in that case which is found at 144 S.E. 2nd 298 stated that the probable cause is based on facts "personal observation of the premises and information from sources believed by the police department to be reliable."

In *Spinelli* v. *United States,* 393 U.S. 410, 89 S. Ct. 554, 21 L. Ed. 2d 637 (1967), the Court held that under the standards of *Aguilar* where there was no showing that the informant was "reliable" and where there was not sufficient underlying circumstances from which the informant had concluded that the defendant was committing the crime, the warrant should be quashed.

The 7th Circuit in a number of cases has followed the decisions of *Aguilar* and *Spinelli* to the extent of reversing convictions. In the case of *United States* v. *Higgins,* 428 F. 2nd 232 (7th Cir., 1970) the Court held that an affidavit which stated information "from an informant who on prior occasions has furnished information which has proved reliable . . ." was insufficient to establish the reliability of the hearsay information. The Court, in reversing that judgment, cited the authority of *Aguilar* and *Spinelli.* Other cases in the same circuit which have also held that information such as contained in this warrant to be insufficient are *United States* v. *Roth,* 391 F. 2nd 507 (1968); *United States* v. *Davis,* 402 F. 2nd 171 (1968).

As this warrant was issued under the authority of the Circuit Court of Cook County a review of Illinois cases shows that this warrant was insufficient to have been issued for State prosecution. A bare anonymous tip (which is all we really have here,) is insufficient to establish probable cause for an arrest. *People* v. *Parren,* 24 Ill. 2nd 542, 182 N.E. 2nd 662 (1962). In *People* v. *Waitts,* 36 Ill. 2nd 467, 224 N.E. 2nd 257, the Illinois Supreme Court held that an arrest warrant which did not state any basis for the arrest and which was based on strictly uncorroborated hearsay was insufficient to arrest a defendant and anything found pursuant to that arrest was inadmissible.

The Supreme Court of Illinois has also had the occasion to scrutinize an affidavit for a search warrant very similar to this one. In *People* v. *Parker,* 42 Ill. 2nd 42, 245 N.E. 2nd 487 (1969) the police officer swore that "he has been informed by an informant who had previously given information to the complainant which had proved to be true" that the defendant had a quantity of marijuana in his home which the informant had personally observed. The Illinois Supreme Court said the warrant was invalid because the magistrate who issued it hadn't been given any information from which the affiant had concluded that the informant was reliable.

In the instant case there has not even been an attempt to say that the informant was reliable but only that the officer spoke to a "citizen." We all know that citizens are, at times, paid police informants and the fact that the officer called his informant a "citizen" does not raise his information to the level of reliability. As pointed out earlier, in *Etchieson* v. *Texas, supra,* the officers said they received the information from "citizen" of Dallas, Texas. This Court reversed the case in a *per curiam* opinion.

No probable cause having been shown for the issuance of the warrant was therefore invalid and anything found during execution of said warrant is inadmissible.

Furthermore, there is no showing whatsoever in the complaint for the search warrant that the information from this anonymous informant was at all timely. The issuing magistrate, the trial court and this Court must guess as to when this "informant" allegedly saw these weapons and when he told the police about them. Of course, what could be probable cause on one date might not be with the passage of time, especially with regard to items which are easily moved from place to place. *Sgro* v. *United States,* 287 U.S. 206, 53 S. Ct. 138, 77 L. Ed. 260.

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The Seventh Circuit in its decision in the instant case has now drastically differed from the First and Sixth Circuit Courts of Appeal. In the present case, the printed portions of the form used by the affiants stated that the affiant "has probable cause to believe that (certain items) are now located" upon the defendant's premises. The Seventh Circuit relied on that language to indicate that the information which the affiant had received was of recent origin. The court felt that the recitation of those facts in the present tense would inspire expedient disclosure to authorities and therefore attest to the timeliness of the complaint for the warrant. In *Rosencranz* v. *United States*, 356 F. 2nd 310 (1st Cir., 1966) that Circuit held that the language in the affidavit which spoke in the present tense was insufficient to establish probable cause that the articles were on the premises sought to be searched. The court went on to hold:

> "The present tense is suspended in the air; it has no point of reference. It speaks, after all, of the time when the anonymous informer conveyed information to the officer which could have been a day, a week or months before the date of the affidavit."

The court pointed out that officers with information of questionable recency could escape embarrassment by simply omitting averments as to time so long as they reported that whatever information they received was stated to be current at that time.

The Sixth Circuit in *United States* v. *Boyd*, 422 F. 2nd 791 (1970) was presented with a proposition that the affidavit for search warrant said "there is *now* being concealed certain property . . ." However, the date of the observation was not supplied to the commissioner under oath and the door was then open to the allegation of a present offense based on stale information. The Sixth

Circuit then, based on the authority of *Rosencranz, supra,* vacated the judgment of the District Court which had held the complaint for the warrant to be sufficient. The Ninth Circuit in *Poldo* v. *United States,* 55 F. 2nd 866 (1932) also held that warrants without indication as to time were insufficient notwithstanding use of a present tense.

The Seventh Circuit in the instant case is relying upon the printed material on a form issued by the Clerk of the Court which should in no way be a substitute for factual information upon which a neutral and detached magistrate can make an intelligent decision as to whether there is probable cause to issue the search warrant.

CONCLUSION

We respectfully pray that the petition for certiorari be granted, and that this conviction be reversed.

Respectfully submitted,

PATRICK A. TUITE,
134 N. LaSalle Street,
Suite 2200,
Chicago, Illinois 60602,
Attorney for Petitioner,

APPENDIX A

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 72-1149

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HERMAN P. UNGER, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois
No. 70-CR-690
William J. Lynch,
Judge.

ARGUED: OCTOBER 17, 1972—DECIDED: NOVEMBER 28, 1972

Before DUFFY, *Senior Circuit Judge,* FAIRCHILD, *Circuit Judge* and GRANT, *District Judge.**

DUFFY, *Senior Circuit Judge.* Defendant-appellant is a licensed firearm dealer. He was tried before the court on a three-count indictment charging possession of unregistered firearms in two counts and a failure to keep registration records in the third count. Defendant was found guilty of the possession charge in Count-I[1] and was fined $500. Defendant appeals.

*Chief Judge Robert A. Grant of the U.S. District Court for the Northern District of Indiana is sitting by designation.

1. Predicated on a statutory violation of 26 U.S.C. § 5861(d).

On December 20, 1970, pursuant to a search warrant, Chicago police detective Vollick and several other City police officers went to defendant's apartment located in Chicago, Illinois. Defendant Unger was present when the officers arrived and led the officers to the basement of his apartment. A number of weapons were discovered in a basement locker including machine guns, rifles, pistols, hand grenade casings, black powder, fuse assembly kits for hand grenades and M-2 conversion kits.

Daniel Harnett, a U.S. Treasury agent, testified that he heard an Assistant State's Attorney warn defendant of his constitutional rights. Later, when defendant was asked whether the M-2 conversion kits were registered defendant replied, "No, you've got me there".

At the trial, defendant moved for a judgment of acquittal without tendering any witnesses after the government had presented their evidence. The basis for this appeal is that the trial court erred in denying defendant's pre-trial motion to quash the search warrant. Therefore, questions concerning the constitutional requirements for obtaining a state search warrant are now before us.

The complaint for the warrant alleged that a private citizen, while working at his occupation, had occasion to be in the basement of an apartment building located on North Ashland Avenue, Chicago. In the course of his work, he observed an enclosed locker in the southeast corner of the basement. There was a small opening in the locker through which a cache of weapons was visible.

The citizen called the police, and based upon his experience with weapons gained while in the Ordnance section of the United States Army, he described the firearms and materials with particularity.

Thereafter, the citizen personally identified the building in question to the police and drew a diagram of the basement disclosing the exact location of the locker where the weapons were stored.

Based upon this information, Detective Vollick, the complainant in the warrant, applied to a magistrate and obtained a search warrant to search the locker and seize the specific weapons which had been described to him by the citizen.[2]

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2. The complaint for the warrant provided in pertinent part:

". . . [C]omplainant . . . requests the issuance of a search warrant to search (the person of Herman Unger and locker in basement at 5424 and 26 N. Ashland, Chicago, Ill., location of locker S/E corner of basement, and seize the following instruments, articles and things: a cache of weapons including machine guns, machine guns with tripods, a rocket launcher, automatic and semi-automatic rifles, and ammunition for the above weapons, which have been used in the commission of, or which constitute evidence of the offense of Unlawful Use of Weapons and Failure to Register.

Complainant says that he has probable cause to believe, based on the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above: The complainant, [is] a police officer for the City of Chicago, presently assigned to Robbery Investigations . . . The officer was contacted by a citizen, who had occasion to be in the basement located at 5424 and 26 North Ashland while working at his occupation, saw in an enclosed locker in that basement, location of locker southeast corner of basement, with mostly 2x4 lumber used in its construction, and observed a cache of weapons and ammunition. This was observed thru a small opening of that locker. The citizen, being familiar with weapons having served in the

Defendant contends on appeal that the District Court improperly denied his motion to suppress the evidence and material listed in the indictment after he attempted to indicate the insufficiency of the complaint for the search warrant. In support of his argument, defendant alleges under the guidelines of *Aguilar* v. *Texas,* 378 U.S. 108 (1964) and *Spinelli* v. *United States,* 393 U.S. 410 (1967) that the complaint for the search warrant herein was insufficient to provide "a neutral and detached magistrate"[3] with the requisite probable cause basis for the warrant to issue and furthermore, the complainant failed to allege or make a showing with respect to the reliability of the unidentified citizen-informant providing the police officer with the pertinent information.

Even if the decision of *Jones* v. *United States,* 362 U.S. 257 (1960) which gives great deference to a magistrate's determination of probable cause is ignored, we are convinced the complaint for warrant was factually sufficient to form a probable cause basis for the warrant to issue. The locker containing the arms and the distinct varieties of arms viewed by the citizen were described with great particularity evincing personal observation. Furthermore, with knowledge of weapons gleaned from the Armed Forces, the citizen was able to list the types of weapons he witnessed inside the locker for police, believing them to be illegally stored or possessed.

United States Army and working in Ordnance while he was in the service, knew what the weapons were. The building was pointed out by the citizen and a diagram, showing the location of the locker in the basement, was made out by the citizen and given to the reporting Investigator."

3. Johnson v. United States, 333 U.S. 10, 14 (1948).

We turn to the question raised by defendant of the omission of an allegation in the complaint for the warrant concerning the reliability of the informant, which defendant considers fatal to the validity of said warrant.

The exactions of the complaint for a search warrant under the Fourth Amendment are propounded by the Supreme Court in *Aguilar, supra,* and later considered in *Spinelli, supra.* Under *Aguilar, supra,* a complaint when based solely on hearsay information from an unidentified informant must recite ". . . some of the underlying circumstances from which the officer concluded the informant . . . was 'credible' or his information 'reliable'." (378 U.S. at 114).

With these stringent requirements as precedent, the Supreme Court considered a reversal of a conviction by the Sixth Circuit where the question concerned the sufficiency of an affidavit upon which a warrant had issued, *United States* v. *Harris,* 412 F. 2d 796 (6 Cir., 1969). Although the Sixth Circuit determined that the first prong of the Aguilar test had been satisfied, Harris' conviction was reversed in that the affidavit for the warrant did not contain a basis for establishing the informant's credibility. The Supreme Court then reversed the holding of the Sixth Circuit, (403 U.S. 573), finding that the affidavit in question contained an "ample factual basis for believing the informant which, when coupled with the affiant's own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant." (403 U.S. 579-580).

Thus, while adhering in general to the *Aguilar, supra,* decision, the Supreme Court clearly indicated the burden of satisfying the so-called second prong of *Aguilar* was not as stringent as *Spinelli* had indicated. The Supreme

Court suggested a more flexible approach to examine probable cause affidavits.

In the case at bar, obvious from the face of the complaint is the fact that the *Aguilar* requirement of an allegation of reliability has been omitted from the wording of the complaint, thereby failing to explicitly attest to the veracity of the informant. Nonetheless, the wording of the complaint sets forth with specificity the facts and circumstances which gave credence to belief that a crime was being committed or criminal activity was evidenced from personal observation. See *Spinelli, supra*, 393 U.S. at 416. The question then must be asked whether "the internal content of the affidavit intrinsically proves the truth of the . . . citizen's word." *United States* v. *Roman*, 451 F. 2d 579, 581 (4 Cir., 1971), and whether this is sufficient to satisfy the reliability standard of Aguilar.

From the face of the complaint, evident is the fact that the citizen was familiar with the premises in question and was possessed with intimate knowledge of the exact location and contents of the locker in question. The allegations of the complainant are not self-serving nor does it appear that the accusations by the citizen were reported to the police merely to spite defendant Unger.[4]

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4. Various federal and state courts have distinguished the government informant considered in Aguilar and Spinelli from the eyewitness, victim of a crime or a citizen who provides information of a crime. These courts while not overruling the guidelines of Aguilar, have dispensed with specific allegations of reliability or past reliable contract with the informant, and inferred that reliability may be deduced from the content of the complaint. The rationale of these holdings is that the concomitant danger of self-interest does not inure to a victim

The Complaint emphasizes the very circumstances from which the magistrate herein could determine that the information given by the citizen was "credible or the infromant was "reliable".

We are of the opinion that the reliability of the citizen's tip is further underwritten by his knowledge of the weapons viewed in the locker and the specificity with which he reported its contents to the police. In addition the citizen pointed out the house where the weapons were stored thereby leaving no chance for error when the search was effected. He also penned a detailed map of the premises indicating the exact location and description of the basement locker. With the apartment building identified to him and with the aforementioned quantum of information in his possession, Detective Vollick applied for the search warrant in question. Furthermore, a police officer's own knowledge of the potential or actual crime and the corroborating evidence of the informant's tip within his knowledge, must be considered as well as his own assessment of the reliability of his source of information. *United States* v. *Harris, supra.*

We recognize that the opinion of the police officer or agent applying for the warrant as to the reliability of the citizen informant is alone insufficient for the issuance of a warrant without allegations thereto in the complaint. But here, the information supplied in the complaint attested to its own integrity by the specificity with which it was stated attesting to an independent reliability and

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or witness to a crime as easily as it would to a government informant. See Brown v. United States, 365 F. 2d 976 (D.C. Cir., 1966); Young v. United States, 435 F. 2d 405 (D.C. Cir., 1970); United States v. James, 452 F. 2d 1375 (D.C. Cir., 1971); United States v. Roman, supra; People v. Hoffman, 45 Ill. 2d 221, 258 N.E. 2d 326 (1970).

when coupled wth the officer's corroboration of the location of the apartment building and his occasion to question the citizen, reliability was established under *United States* v. *Harris, supra.*

We therefore hold the complaint for the warrant herein was sufficient under the guidelines of *Aguilar* and *Spinelli* as interpreted by *Harris* and the motion to suppress was properly denied by the District Court.

The defendant raises one further attack on the sufficiency of the warrant on appeal; that the complaint does not indicate on its face that the information supplied by the citizen was timely.

We agree with the statement of the government that the weapons which had been observed complete with appropriate ammunition had a devastating destructive capacity; that the citizen informant who was familiar with weapons by virtue of his military experience would be likely to act upon his discovery with a degree of immediacy.

Furthermore, the complaint for the warrant in the case at bar includes rhetoric which would indicate that the included events and observations had occurred recently, which is significant when determining whether probable cause existed at the time the warrant issued. The complaint stated that the officer "has probable cause to believe" that the items to be seized "are now located" at the place in question. We believe the recitation of these facts in the present tense[5] as well as the potential

5. See Stone v. United States, 390 U.S. 204 (1968) (" . . . the use of the present tense" indicates that information was supplied close to the time of the affidavit); Rider v. United States, 355 F. 2d 192 (5 Cir., 1966); United States v. Slapo, 285 F. Supp. 513 (S.D.N.Y. 1963).

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for harm which would inspire expedient disclosure to authorities attest to the timeliness of the complaint for the warrant. Cf. *Sgro* v. *United States,* 287 U.S. 206 (1932).

It is our view that the warrant in this case was properly issued and that the evidence seized pursuant to the warrant was properly admitted in the trial.

The judgment of conviction is

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
January 2, 1973

Before

Hon. F. Ryan Duffy, Senior Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Myron L. Gordon, District Judge

No. 72-1149
United States of America,
Plaintiff-Appellee

v.

Herman P. Unger, Jr.,
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED that the petition for rehearing filed in this appeal be and the same is hereby DENIED.

APPENDIX C

Matthew J. Danaher
Clerk of Court

State of Illinois }
County of Cook } ss.

The Circuit Court of Cook County

The People of the State of Illinois to all peace officers of the state.

SEARCH WARRANT

On this day Investigator Monroe J. Vollick #10442, Complainant has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause.

I therefore command that you search Herman Unger and basement locker at south east corner of building 5426 & 26 N. Ashland Chicago, Cook, Illinois, and seize a cache of weapons, including machine guns, machine guns with tripods, rifles, rocket launchers, cases of ammunition for the above weapons, all in violation of the Illinois Revised Statutes relating to Unlawful Use of Weapons as defined in the Illinois Revised Statutes which have been used in the commission of or which constitute evidence of the offense of Unlawful Use of Weapons and Failure to Register.

I further command that a return of anything so seized shall Judge Branch 44, 2600 S. California, Chicago, Ill., or before any court of competent jurisdiction.

.....
Judge

Time and date of issuance .....
Matthew J. Danaher, Clerk of the Circuit Court of Cook County

....
(Court Branch) (Court Date)

State of Illinois }
County of Cook } ss.

The Circuit Court of Cook County

COMPLAINT FOR SEARCH WARRANT

Investigator Monroe J. Vollick #10442 complainant now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to search (the person of Herman Unger and locker in basement at 5424 and 26 N. Ashland, Chicago, Ill., location of locker S/E corner of basement, and seize the following instruments, articles and things: a cache of weapons including machine guns, machine guns with tripods, a rocket launcher, automatic and semi-automatic rifles, and ammunition for the above weapons, which have been used in the commission of, or which constitute evidence of the offense of Unlawful Use of Weapons and Failure to Register.

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above: The Complainant, a police offi-

cer for the City of Chicago, presently assigned to Robbery Investigations from the 6th Area located at 3801 N. Damen Ave. The officer was contacted by a citizen, who had occasion to be in the basement located at 5424 & 26 N. Ashland while working at his occupation, saw in an enclosed locker in that basement, located of locker south east corner of basement, with mostly 2x4 lumber used in its construction and observed a cache of weapons and ammunition. This was observed thru a small opening of that locker. The citizen, being familiar with weapons having served in the United States Army and working in Ordnance while he was in the service, knew what the weapons were. The building was pointed out by the citizen and a diagram, showing the location of the locker in the basement, was made out by the citizen and given to the reporting Investigator.

/s/ Monroe J. Vollick #10442
Complainant

Subscribed and sworn to before me on December 20, 1970

.....

CCMC-1-219 NEW

MATTHEW J. DANAHER, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

(Court Branch) (Court Date)

STATE OF ILLINOIS)
COUNTY OF COOK) ss. THE CIRCUIT COURT OF COOK COUNTY

COMPLAINT FOR SEARCH WARRANT

Investigator Monroe J. Vollick #10442 complainant now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to search (the person of [illegible] HERMAN UNGAR and locker in basement at 5929 and 26 N. ASHLAND, location of locker S/E corner of BASEMENT, CHICAGO, ILL. (Premises, City and State)

and seize the following instruments, articles and things: ~~a cache of weapons~~ including machine guns, machine guns with tripods, a rocket launcher, semi-automatic automatic and semitic rifles, and weapo ammunition for the above weapons.

which have been used in the commission of, or which constitute evidence of the offense of Unlawful Use of Weapons and Failure to Register

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above:

The complainant, a police officer for the City of Chicago, presently assigned to Robbery Investigations from the 6th Area located at 3001 N. Damen Ave. The officer was contacted by a citizen, who had occassion to be in the basement located at 5924 and 26 N. ASHLAND while working at his occupation, saw in an enclosed locker in that basement, location of locker SOUTH EAST CORNER OF BASEMENT, WITH METAL DOOR LOCKED USING THE MASTERMIND. and observed a cache of weapons and ammunition. This was observed thru a small opening of that locker. The citizen, in being familiar with weapons having served in the United States Army and working in Ordinance while he was in the service, knew what the weapons were. The building was pointed out by the citizen and a diagram, showing the location of the locker in the basement, was made out by the citizen and given to the reporting Investigator.

Jno Monroe J. Vollick #10442
Complainant

Subscribed and sworn to before me on December 20 1971

[illegible]
Judge

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MATTHEW J. DANAHER
Clerk of Court

CCMC-1-220

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

THE CIRCUIT COURT OF COOK COUNTY

The People of the State of Illinois to all peace officers of the state.

SEARCH WARRANT

On this day Investigator Monroe J. Vollick #10442, Complainant has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause

I therefore command that you search HERMAN UNGER (PERSON)
and basement locker 5424-26 N. Ashland (PREMISES) Chicago, Cook, Illinois, (CITY AND STATE)
and seize a cache of weapons, including machine guns, machine guns with tripods, rifles, racket launchers, cases of ammunition for the above weapons, all in violation of the Illinois Revised Statutes relating to Unlawful Use of Weapons as defined in the Illinois Revised Statutes, (INSTRUMENTS, ARTICLES, AND THINGS)

which have been used in the commission of or which constitute evidence of the offense of Unlawful Use of Weapons and Failure to Register

I further command that a return of anything so seized shall be made without unnecessary delay before me or before Judge Branch 44, 2600 S. California, Chicago, Ill. or before any court of competent jurisdiction.

JUDGE

Time and date of issuance

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1063

HERMAN P. UNGER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possessing unregistered firearms, machine guns, rifles, pistols, and hand grenades in violation of 26 U.S.C. 5861(a) and fined $500. The court of appeals affirmed (Pet. App. A).

Petitioner contends that the affidavit for the search warrant, pursuant to which the police discovered and seized the unregistered firearms, was insufficient. The affidavit is set forth at Pet. App. 13-14 n. 2. Petitioner's contention was fully answered in the lengthy opinion of the court below, upon which we rely (Pet. App. 11-19).[1]

[1]As to petitioner's suggestion that the decision below on the question of the timeliness of the information conflicts with *Rosencranz* v. *United States*, 356 F. 2d 310 (C.A. 1), and *United States* v. *Boyd*, 422 F. 2d 791 (C.A. 6), we note that the information there—that an informant had detected the odor of fermenting mash on the defendant's property—did not carry the strong implication of immediacy and urgency inherent in the information concerning the dangerous weapons involved here. See Pet. App. 18-19.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.